

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, 03cr833

v. U.S. Courthouse  
Brooklyn, New York

MYRON GUSHLAK,  
November 18, 2010

Defendant. 11:15 p.m.

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TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE NICHOLAS G. GARAUFIS  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: LORETTA E. LYNCH, ESQ.  
United States Attorney  
By: DANIEL SPECTOR  
Assistant U.S. Attorney  
271 Cadman Plaza East  
Brooklyn, New York 11201

For the Defendant: ALAN FUTERFAS, ESQ.

Also Present;  
Charles Linehan,  
Assistant District  
Attorney, NY County

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Proceedings recorded by mechanical stenography, transcript  
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1 (Open court-case called-appearances noted.)

2 THE COURT: Please be seated.

3 Good morning. This is a continuation of the  
4 sentencing proceeding for Myron Gushlak. I have received this  
5 morning by fax an additional submission by Mr. Futerfas.

6 Have you seen a copy of that?

7 MR. SPECTOR: Yes, your Honor.

8 THE COURT: I have also received -- I'm not sure how  
9 it got there in my chambers -- also a letter from the  
10 government.

11 Have you seen that?

12 MR. FUTERFAS: Yes, I have, your Honor. The  
13 government e-mailed it to me and I was able to view it.

14 THE COURT: Very well.

15 I've read both documents and I don't know that I  
16 need to make any further comment on them, unless you wish to  
17 make a comment on them?

18 I take it that is sufficient. You have a record.

19 MR. FUTERFAS: With respect to my letter, I think my  
20 letter is self-explanatory. With respect to the government's  
21 letter I certainly have comment.

22 THE COURT: Tell me what your comment is.

23 MR. FUTERFAS: My comment is, your Honor, I  
24 personally met with the German authorize in May 2010. I was  
25 there and Mets with the prosecutor there and met with the two

1 detectives who were on the case and at that time we asked --  
2 this was a meeting with four defense lawyers, the lawyer from  
3 Germany, the lawyer from Switzerland, myself and Miss Shein.

4 We met with the government there, spoke to the  
5 prosecutor -- not a detective -- and asked what the claims  
6 have been for losses in the case because we wanted to get an  
7 assessment of what their view of what the restitution or  
8 claims or whatever was out there. The number given us was  
9 less than a hundred thousand euros -- less than a hundred  
10 thousand euros.

11 The interesting thing about the government's letter  
12 is, it's precisely this letter, this is precisely the reason I  
13 think your Honor made the decision yesterday to put the German  
14 case aside because to take this letter into account when Frick  
15 may never -- who is the alleged mastermind of this, who may  
16 never be brought to trial, or if he's brought to trial,  
17 acquitted or maybe brought to trial in Germany and given a  
18 one-year sentence, and the German authorities may decide never  
19 to charge Mr. Gushlak -- to take a letter like that into  
20 account would be just wrong from so many different  
21 perspectives.

22 I think what your Honor said, we're not going to  
23 have that trial here. This letter proves why your Honor is  
24 correct in the determination not to have the German trial in  
25 this courtroom; let them do it, they have investigated it,

1 it's their case with their citizens and let them bring it.

2 If they have a case against Mr. Gushlak let them  
3 bring it. If they want to sentence him over there, if they  
4 can bring a case and convict him, let them sentence him, but I  
5 think your Honor's decision yesterday to not have that trial  
6 in this courtroom on incomplete information was accurate.

7 THE COURT: Do you have any comments on the letter  
8 that I received from defense counsel?

9 MR. SPECTOR: Obviously we oppose the assertions  
10 made. To the extent the court is not going to revisit any of  
11 its rulings, we don't feel any response is necessary.

12 THE COURT: All right.

13 Let me ask the government also, with respect to the  
14 victims of the crimes to which the defendant has pleaded  
15 guilty, have you informed the victims?

16 Do you know who the victims are?

17 I'm obligated to give the victims an opportunity to  
18 address the court if they can be found and they have the  
19 desire to do so.

20 MR. SPECTOR: I don't know the answer to that  
21 question. We have not notified victims because of the  
22 proceedings being under seal. The addresses we have are  
23 somewhat old. I haven't looked at that issue closely because  
24 we'll deal with it at the time of restitution. But they  
25 haven't been notified.

1           THE COURT: I'm not going to determine restitution  
2 for 90 days. We will set a schedule on that proceeding when  
3 I'm finished with the rest of the sentencing.

4           MR. SPECTOR: Thank you, Judge.

5           MR. FUTERFAS: Your Honor, may I speak to that issue  
6 very briefly?

7           THE COURT: Sure.

8           MR. FUTERFAS: In Exhibit M to our reply sentencing  
9 memorandum, we include a copy of the amended judgment in U.S.  
10 versus Howard Appel. An exhibit to that, for the purposes of  
11 restitution, lists all the names of individuals who have been  
12 contacted and with respect to all of his, Mr. Appel's, cases,  
13 including GlobalNet. So I think that has already been done,  
14 your Honor.

15           MR. SPECTOR: We can address that at the appropriate  
16 time, your Honor.

17           THE COURT: Ordinarily this would be the  
18 appropriate time.

19           MR. SPECTOR: I understand, Judge.

20           THE COURT: I just point that out.

21           Certainly, if any of the victims wish to be heard in  
22 connection with restitution, I'll be happy to hear from them  
23 prior to issuing a final judgment including restitution.

24           MR. SPECTOR: Thank you, Judge.

25           THE COURT: Now, during yesterday's proceedings the

1 court determined that defendant's total offense level is a 31  
2 and that under the 2000 Sentencing Guidelines, which are  
3 operative in this case, the defendant's advisory guidelines  
4 range is 108 to 135 months in the custody of the Attorney  
5 General. This was based in part on a base offense level of 23  
6 for count two.

7 Before I go any further, is there any comment on the  
8 base offense level by any of the parties?

9 MR. FUTERFAS: No, your Honor.

10 MR. SPECTOR: No, Judge.

11 THE COURT: All right. Let me go forward then.

12 Yesterday the court indicated that it would put off  
13 the discussion of the fine applicable to defendant until its  
14 discussion of the application of the 3553(a) factors in the  
15 determination of the defendant's sentence.

16 Under Section 5E1.2C4 of the 2000 guidelines, the  
17 maximum fine indicated by the guidelines for an offense level  
18 of 31 does not apply to the defendant because other statutes  
19 authorize a higher fine than that provided for in 5E1.2.

20 Specifically, 18 United States Code,  
21 Section 1956(a)(1) and Section 1956(h) authorize the court to  
22 impose a fine equal to twice the value of the property  
23 involved in the money laundering transactions to which  
24 defendant has pleaded guilty.

25 In his plea colloquy and in count two of the

1 information, defendant admitted that he laundered the funds  
2 obtained from the three sets of sales of securities listed as  
3 overt acts in furtherance of the securities fraud conspiracy  
4 charged in count one of the information.

5           These three sets of sales of securities yielded at  
6 least \$13,868,665.50. Under 18 United States Code,  
7 Section 1956 (a)(1), the court may impose a fine equal to  
8 twice the amount of the property involved in the money  
9 laundering transactions. Therefore, the maximum authorized  
10 fine is \$27,737,311.

11           With regard to the factors that I must consider  
12 under Title 18 United States Code, Section 3553(a) let me say  
13 the following: Application of the Section 3553(a) factors to  
14 the defendant present the court with several challenges, the  
15 first of which is defendant's inconsistent behavior with  
16 respect to his cooperation. On one hand, defendant promptly  
17 approached the New York County District Attorney's office when  
18 he learned of that office's investigation into his fraudulent  
19 pump and dump scheme.

20           Defendant, a Canadian citizen living in Grand  
21 Cayman, came to the United States of his own volition, fully  
22 disclosed his fraudulent activities to the government and  
23 entered a guilty plea to the information.

24           Over the next six years defendant met numerous times  
25 with several U.S. law enforcement agencies to provide them

1 with intelligence on suspected fraudsters and to allow them to  
2 make use of his technical expertise relating to fraudulent  
3 schemes.

4           There are indications that his cooperation was  
5 useful to the government in identifying fraudulent activity  
6 and securing the cooperation of others engaged in similar  
7 securities fraud schemes.

8           Defense counsel has represented to the court that he  
9 has been informed by a former assistant United States attorney  
10 in this district that the office at one time was in possession  
11 of a draft document detailing the benefits of defendant's  
12 cooperation.

13           But defendant was far from a model cooperator.  
14 There are substantial and troubling indications that defendant  
15 regarded the secrecy of his cooperation not as a necessary  
16 protection of his future usefulness to the government but as a  
17 license to continue to deceive those with whom he conducted  
18 business.

19           In a brazen example of defendant's efforts to take  
20 advantage of the secrecy of his cooperation, the Website of  
21 defendant's private investment bank continued to display for  
22 several years after defendant pleaded guilty the name and logo  
23 of GlobalNet as a former client. GlobalNet was one of three  
24 companies whose stock defendant pleaded guilty to pumping and  
25 dumping in 2003.

1 Defendant was only able to use the name and logo of  
2 the company to entice future clients because the information  
3 charging him with fraud in relation to GlobalNet was kept  
4 under seal.

5 The government has also provided the court with  
6 direct evidence of defendant's false statements to a business  
7 associate, Patrick Kealy, about the defendant's history and  
8 involvement with U.S. law enforcement agencies.  
9 Contemporaneous with his lies to Kealy, the government  
10 represents that the defendant pressured the New York County's  
11 District Attorney's office not to put him on the witness stand  
12 in a case that was then set for trial.

13 While reluctance to testify is not unknown among  
14 witnesses in general, it should have been one of defendant's  
15 most important goals as the opportunity to testify would  
16 provide the government with compelling evidence to include in  
17 a Section 5K1.1 substantial assistance motion that defendant  
18 believed the government would make on his behalf.

19 The court can only infer from this behavior that  
20 defendant was less concerned with this court's sentencing  
21 decision than he was with presenting himself from being outed  
22 as a convicted felon and fraudster because of the obvious  
23 negative impact that information would have on his business  
24 activities.

25 While defendant argues that he lied to Kealy because

1 he believed he was obligated to do so by his cooperation  
2 agreement, he freely admits that he did not at any time seek  
3 the government's advice on how to handle the inquiry which  
4 prompted his lie.

5 Indeed, defendant's sentencing submissions indicate  
6 that keeping secret the fraudulent schemes that are the basis  
7 for this conviction has always been a central goal of  
8 defendant's cooperation.

9 Defendant notes in his sentencing memorandum that he  
10 pressed the government to quickly release him from jail  
11 following his initial arrest so that others against whom  
12 defendant could cooperate would not learn of the U.S.  
13 Attorney's office's investigation into his conduct. It seems  
14 apparent that defendant has always been more interested in  
15 keeping his cooperation secret than the government has.

16 Defendant's behavior has also been inconsistent with  
17 the appropriate relationship between cooperator and his law  
18 enforcement handlers. As the government has argued in this  
19 sentencing proceeding, and as the court well knows from  
20 observing the testimony of numerous cooperating witnesses over  
21 the last ten years, an essential attribute of a successful  
22 cooperating witness is the credibility that witness earns from  
23 fully disclosing all relevant and potentially inculpatory  
24 information to the government.

25 There are several examples of defendant's failure to

1 keep the government fully apprised of relevant information.

2 First, by defendant's own admission in this proceeding, he  
3 failed to promptly notify the government that he is being  
4 investigated by the German authorities for securities fraud, a  
5 fact which would have been damning to the prosecution's case  
6 were it to come out in a trial in which defendant had been  
7 called to testify.

8 Second, defendant earned a fortune speculating on  
9 penny energy stocks mere months after telling the government  
10 that he lacked the means to pay a relatively small forfeiture  
11 judgment, but failed to tell the government this until after  
12 he funneled what now amounts to \$50 million into an  
13 irrevocable trust he established for the benefit of his  
14 children.

15 Defendant admitted to the court that even though he  
16 knew he would be subject to a fine and an order of restitution  
17 as a result of a guilty plea, defendant did not consult with  
18 the government before placing these substantial assets into a  
19 trust which is potentially beyond the reach of this court's  
20 legal process. Defendant never approached the government to  
21 ask how he might use his sudden wealth to pay restitution to  
22 the victims of his criminal conduct.

23 Finally, when the government confronted defendant  
24 with its concerns about his cooperation, he declined to meet  
25 with the government face-to-face to explain his conduct.

1 Yesterday defendant stated to the court that his son  
2 Ryan is ill and needs his constant support as he recovers from  
3 his serious depression. The court is most sympathetic to his  
4 son's condition, but defendant also admitted yesterday that he  
5 has not informed Ryan of his guilty plea over seven years ago  
6 or that is being sentenced and faces years of prison time.

7 Instead of preparing his son for the reality of life  
8 without him, defendant has chosen to conceal his criminal  
9 conduct from the one person who is closest to him and about  
10 whom he claims to care the most. These and other facts compel  
11 the court to question whether defendant is truly remorseful  
12 for his criminal conduct and appreciates the seriousness of  
13 the offenses he committed.

14 While defendant is entitled to some credit for his  
15 assistance to law enforcement, he is not situated similarly to  
16 Mr. Appel, one of his coconspirators in the GlobalNet fraud,  
17 who received an extremely lenient sentence as a result of his  
18 extensive cooperation.

19 The court finds that a stiffer sentence is warranted  
20 for, among other reasons, the history and characteristics of  
21 this particular defendant, the need to protect the public from  
22 further crimes by the defendant, and to promote respect for  
23 the law.

24 To be perfectly clear, the sentence imposed by the  
25 court today is not influenced in any way by the government's

1 submission of evidence purporting to show that defendant has  
2 engaged in securities fraud in Germany. As the court  
3 explained yesterday, that evidence was relevant only to the  
4 court's conclusion that the government had a good-faith basis  
5 to determine that defendant breached his cooperation  
6 agreement.

7 In determining the proper balance to strike between  
8 a term of incarceration and the amount of the fine, the court  
9 has carefully considered the 3553(a) factors, the factors  
10 listed in Section 5E1.2(d) of the 2000 Sentencing Guidelines,  
11 and the need for the court to enter an order of restitution  
12 under 18 United States Code, Sections 3663 and 3664.

13 The court agrees with the government's argument that  
14 it should impose a longer term of incarceration in relation to  
15 the size of the fine than in other similar cases because  
16 defendant's assets are located outside the United States and  
17 will be difficult for the government to reach.

18 While the court is advised that the defendant is the  
19 owner or beneficial owner of significant assets, any fine  
20 imposed by the court would have reduced deterrent and punitive  
21 value because of the difficulty of enforcing the judgment on  
22 assets outside the United States. However, the court does not  
23 agree that all defendant's assets are necessarily unreachable.

24 For example, enterprising assistants in the U.S.  
25 Attorney's office may have success in pursuing the assets of

1 Crossroads TrustCrossroads Trust under a fraudulent conveyance  
2 or other legal theory.

3 Furthermore, a fine will serve to provide a modicum  
4 of protection to U.S. investors who are at risk of harm from  
5 financial crimes defendant might perpetrate after he serves  
6 his prison sentence and is deported.

7 In the future, defendant will have to carefully  
8 avoid the United States to avoid the risk that any of his  
9 assets, intangible or otherwise, could come within the  
10 jurisdiction of the United States courts.

11 A large fine is also warranted in this case because  
12 of the significant risk that defendant is in possession of  
13 assets that he has not disclosed to the court, in addition to  
14 his considerable disclosed assets and the reasonable  
15 probability defendant will be able to pay the fine with the  
16 proceeds of his investment activities following his release  
17 from prison.

18 Are you ready to be sentenced?

19 MR. SPECTOR: Judge, I'm sorry, there's just one  
20 minor factual correction.

21 THE COURT: Let me hear it.

22 MR. SPECTOR: The case in 2007, where it was  
23 contemplated the defendant would testify as a witness, that  
24 was a case brought by our office and not the New York County  
25 District Attorney's office.

1 THE COURT: Thank you. I stand corrected.

2 MR. FUTERFAS: Your Honor, may I?

3 THE COURT: Go ahead.

4 MR. FUTERFAS: As we put in our memo, the reason  
5 that he didn't want to be revealed that he was arrested when  
6 Mr. Gushlak was arrested in 2003 was to accommodate law  
7 enforcement who wanted to use him specifically to --  
8 specifically the state authorities wanted to use him  
9 immediately and if it became public that he was arrested  
10 people he might be able to contact would not be willing to  
11 speak with him. That's it, your Honor.

12 THE COURT: All right.

13 I understand your position on that, but my comments  
14 go to the entire period from the time of his arrest to the  
15 present.

16 I didn't describe my concerns based on the snapshot  
17 in time, I described my concerns and my findings because of  
18 his behavior over a lengthy period of time. But your point is  
19 made and I understand it. Thank you.

20 Mr. Gushlak, will you please come up here with your  
21 attorney. Are you ready to be sentenced, sir?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: On count one, I sentence you to  
24 60 months in the custody of the Attorney General, which is the  
25 statutory maximum, and that will be concurrent with the

1 sentence that I will now impose on count two.

2 On count two, I sentence you to 72 months in the  
3 custody of the Attorney General. I am imposing a fine of  
4 \$25 million payable immediately. I am imposing a period of  
5 supervised release of three years on the two counts. There is  
6 a special assessment of \$200. Restitution will be finalized  
7 within 90 days.

8 The following special conditions apply to your  
9 supervised release: You must comply with the restitution  
10 order. You must pay the fine as ordered by the court. You  
11 will provide full financial disclosure to the Probation  
12 Department. You shall not possess a firearm, ammunition or  
13 destructive device.

14 If you are excluded from the United States in a  
15 separate proceeding brought by the U.S. Department of Homeland  
16 Security, you may not reenter the United States illegally.

17 With regard to the payment schedule and restitution,  
18 the fine is due and payable immediately in a lump sum, as I  
19 said; however, the court will make a determination of the  
20 actual amounts of loss suffered by the victims of your  
21 offenses and will enter an order of restitution within 90 days  
22 of today's date, under Title 18 United States Code,  
23 Section 3664(d)(5).

24 Under Sentencing Guideline 5E1.1(c) any funds  
25 obtained from the defendant in payment of sum or all of the

1 fine shall be retained until such time as the court enters an  
2 order of restitution. When the court enters an order of  
3 restitution, the funds obtained from the defendant shall first  
4 be applied to satisfy the order of restitution before being  
5 applied toward defendant's fine.

6 With respect to forfeiture, because the court did  
7 not find by a preponderance of the evidence that the defendant  
8 fraudulently induced the government into entering into an  
9 amended forfeiture agreement, the court will not void the  
10 preliminary order of forfeiture and it becomes the final order  
11 of forfeiture on entry of judgment against the defendant.

12 You have the right to appeal your sentence to the  
13 United States Court of Appeals for the Second Circuit if you  
14 believe the court has not properly followed the law in  
15 sentencing you. Your time to appeal is extremely limited and  
16 therefore you should discuss with your attorneys at once  
17 whether an appeal would be worthwhile.

18 Do you understand?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Anything else from the government.

21 MR. SPECTOR: Yes, your Honor. Two matters. First,  
22 we would seek a special condition of supervised release and  
23 that the defendant not engage in any way in the securities  
24 industry, directly or indirectly. It's a bit theoretical  
25 since he'll be outside the United States, but I think it's an

1 appropriate condition to impose.

2 THE COURT: I can't control what he does outside of  
3 the United States. I will impose it with respect to any  
4 activity that touches or concerns the securities industry in  
5 the United States.

6 If you would like to provide me with specific  
7 language, provide it, with a copy to Mr. Futerfas, and I will  
8 consider it to be placed in the judgment after hearing from  
9 Mr. Futerfas.

10 MR. FUTERFAS: Your Honor -- do you have anything  
11 else, Mr. Spector?

12 MR. SPECTOR: Yes, your Honor. We are also seeking  
13 the defendant's remand into custody at this time.

14 THE COURT: Mr. Futerfas.

15 MR. FUTERFAS: Your Honor, first, if your Honor  
16 could designate a facility or recommend a facility in the  
17 Northeast Region that would be --

18 THE COURT: Yes, I recommend, but I cannot require,  
19 that the Bureau of Prisons designate the defendant to an  
20 appropriate facility in the Northeast Region of the United  
21 States.

22 I also request that the designation be made as  
23 promptly as possible, and I request the government's  
24 assistance in making the designation so that the defendant may  
25 be transferred to such a facility in the next several weeks.

1 MR. FUTERFAS: The second thing, your Honor, is,  
2 because he's not a citizen, it's not clear whether he would be  
3 camp eligible or not. To the extent that your Honor can  
4 recommend the most lenient facility, obviously it's a first  
5 offense and all the other factors -- he has been here before  
6 the court for years --

7 THE COURT: I authorize the government and the  
8 defense to advise the Bureau of Prisons that the defendant has  
9 been totally cooperative with the court in appearing in court  
10 whenever required to do so, appearing here for sentencing over  
11 a period of two days and that, as to his behavior before the  
12 court, it has always been decorous and the court believes,  
13 that if the regulations permit, the defendant should be placed  
14 in a camp setting during the period of his sentence.

15 Anything else?

16 MR. FUTERFAS: The last thing I have, your Honor, is  
17 that I would like an opportunity, if possible -- Mr. Gushlak  
18 is being sentenced Friday, December 3rd by Judge Hayes --  
19 Mr. Gushlak have an opportunity to visit with his son not  
20 behind a wall or behind a glass.

21 THE COURT: Is his son here?

22 MR. FUTERFAS: No. His son is in Indiana -- and  
23 that he would surrender directly December 1st or December 2nd,  
24 which is just, I don't know, ten days away, seven days away.

25 THE COURT: I'm remanding the defendant to the

1 custody of the Marshals Service at this time.

2 Anything further from the government?

3 MR. SPECTOR: Not from the government, your Honor.

4 THE COURT: Let me give and you schedule for  
5 restitution.

6 The briefing schedule for restitution is that the  
7 government's evidentiary submissions as to the victims' actual  
8 losses and any memorandum of law that may be necessary are due  
9 Monday, December 20, 2010.

10 Defense's response is due Monday January 10, 2011.  
11 The government's reply, if any, is due Monday, January 17,  
12 2011.

13 The court will schedule a hearing date if it  
14 determines one is necessary.

15 Any hearing will occur sufficiently soon after the  
16 briefs have been submitted to give the court time to make its  
17 determination of restitution within the statutory 90-day  
18 period which ends on Wednesday, February 16, 2011.

19 Because the court is obligated to make a final  
20 determination in 90 days, the court will grant no extensions  
21 of the schedule.

22 Do you understand?

23 MR. SPECTOR: Yes, your Honor.

24 THE COURT: You understand?

25 MR. FUTERFAS: Yes, your Honor.

1 THE COURT: Anything further?

2 MR. SPECTOR: We would seek that the entire case now  
3 be unsealed, with the understanding that within two weeks  
4 we'll provide proposed redacted versions of certain documents.

5 MR. FUTERFAS: I would request that the case remain  
6 sealed until we provide that. There is lots of information  
7 that I think the government and I would agree should remain  
8 under seal, so do it the other way.

9 THE COURT: All right.

10 As a practical matter, until I get a redacted  
11 version of whatever you want to remain sealed, it would be  
12 impossible to place all the materials on the public docket.

13 Whichever way you say it, the documents remain  
14 sealed and the transcripts remain sealed, as to those  
15 proceedings which took place under seal, until such time as I  
16 receive your agreement as to the items that should be removed  
17 from the public record, but I'm going to give you two weeks to  
18 complete the process.

19 If you need more time, Mr. Futerfas, you'll apply  
20 for it I'm sure. Neither counsel here is reluctant to contact  
21 the court, based on prior experience.

22 Anything else from the government for today?

23 MR. SPECTOR: No, your Honor.

24 THE COURT: Anything else from you, sir?

25 MR. FUTERFAS: Can I have a minute with Mr. Gushlak

1 before they bring him into the back, just to consult?

2 THE COURT: That's fine.

3 Thank you everyone. All right, I have signed an  
4 order remanding the defendant to the custody of the Marshals  
5 Service.

6 Thank you all.

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